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Case No. 93-1160

Supreme Court, U.S.
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IN THE
SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 1993

BRANDON PATRICK MICHAELS,
TERRI VOGEL MICHAELS,
Individually and as Next Friend of
CLARK JORDAN MICHAELS and
ALEXANDER MICHAELS,
Petitioners

vs

PRODIGY CHILD DEVELOPMENT
CENTERS, INC.,
Respondent

ON PETITION FOR WRIT OF CERTIORARI TO THE
SUPREME COURT OF GEORGIA

BRIEF FOR RESPONDENT

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BRIEF FOR RESPONDENT

Prodigy Child Development Centers, Inc., the respondent herein, respectfully prays that the Petition for Writ of Certiorari be denied.

I.

STATEMENT OF THE CASE

The Respondent, Prodigy Child Development Centers, Inc. ("Prodigy"), is a licensed daycare center as defined by O.C.G.A. § 49-5-12. Licensed daycare centers are statutorily required to report suspected child abuse to the Department of Family and Children Services (DFCS). *O.C.G.A. §19-7-5(c)(1)(K).* It is a criminal offense for mandated reporters to fail to report suspected child abuse. *O.C.G.A. § 19-7-5(h).* Furthermore, Georgia law not only deems all reports of suspected child abuse to be confidential and privileged for the protection of mandated reporters, but also ensures immunity from civil and criminal liability for all mandated reporters who report incidents of suspected child abuse in good faith. (*O.C.G.A. § §49-5-40(b) and 19-7-5(f)*).

The explanatory directives issued by the Georgia Council of Child Abuse instruct mandated reporters to report suspected child abuse whenever the mandated reporter has

"reasonable cause to believe that such abuse has occurred." These directives provide:

> The standard of 'reasonable cause to believe' that abuse has occurred implies the reporter is not to obtain proof abuse has occurred. Responsibility for investigating and proving abuse is with the Department of Family and Children Services or the criminal justice system, depending on the nature of the case. The child abuse report should be understood as a request for an investigation by DFCS. *(R. 997)*.

In compliance with O.C.G.A. § 19-7-5 and the Georgia Council of Child Abuse directives, Prodigy reported to DFCS that one of its students, Clark Jordan Michaels (C.J.), exhibited certain behavior which is symptomatic of child abuse. The Petitioners are the parents of C.J.

The Petitioners' statement of the case misrepresents and omits certain material facts. The Petitioners incorrectly suggest that the deprivation of their children was the result of some tortious act on the part of Prodigy. The Petitioners suggest that Prodigy was guilty of perjury, fraud, and breach

of contract, even though Prodigy denied all of these allegations and obtained summary judgment in the trial court. The Petitioners' statement of the case also fails to disclose that the Petitioner's experts admitted that the behavior which Prodigy reported to DFCS is symptomatic of child abuse. The Petitioners' experts further admitted that this behavior should have been reported to DFCS.[1]

Petitioners' statement of the case also fails to disclose that DFCS did not decide to temporarily remove C.J. and his brother from the home of Petitioners until after C.J. was no longer enrolled at Prodigy. Furthermore, Petitioners did not reveal to this Court that DFCS' decision was not based upon any report of suspected child abuse which was made by

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[1] Barrie Alexander, the Petitioners' primary defense witness, admitted that Prodigy should have reported the behavior to DFCS and that the behavior should have been investigated by DFCS. *R-2588* (Alexander Depo. pp. 27, 28). Dr. James D. Larson, the Petitioners' other expert, admitted that DFCS should have investigated whether C.J. had been sexually abused by his father, based upon certain statements which C.J. made while enrolled at Children's World. *R-2586, 2587* (Larson Depo., pp. 26, 39, 40).

Prodigy. Rather, DFCS' decision was based upon statements made by C.J. to DFCS during an interview at Childrens' World, an unrelated daycare center. (*R-1351*, Juv. Ct. T., Vol II, p. 4). While he was enrolled at Childrens' World, C.J. reportedly told DFCS: . . . *daddy touches me on my penis* (*R-2603*, Magis. Ct. T. p. 11) . . . *daddy told me I couldn't tell anyone where he touched me.* (*R-2601*, Magis. Ct. T. p. 9).

On the day following the initial deprivation, DFCS interviewed C.J. at Children's World a second time. The investigating officer described the interview as follows:

> A: The next time we interviewed the child was the following day; we interviewed him at the children's shelter, and he described - - again, it was the same type of interview. He was real hesitant to talk about dad. He was afraid that dad was going to whip him. He cried about dad whipping him. He said dad gets real mad. And he continued to say that dad did touch him. In describing how dad touched him, he had a toothbrush, he put his hand on the toothbrush and went in an up and down motion. (indicating) (*R-2603*, Magis. Ct. T. p. 11).

The Petitioners further failed to disclose that Prodigy was not present at the interview which resulted in the deprivation, and that Prodigy was not involved in the DFCS decision to remove the children from Petitioners. Furthermore, Prodigy was not involved in the emergency preliminary deprivation hearing which resulted in the actual temporary removal of the children. (*R-902, 905, 906,* McHugh Depo., pp. 111, 114).

The record reveals that DFCS retained a qualified psychologist to evaluate C.J. after the initial deprivation. This psychologist conducted extensive testing and concluded that C.J. had been sexually abused by his father. Based upon the psychologist's report, DFCS decided that it was in the best interest of the children to proceed with the prosecution of the deprivation hearing. (*R-1064, 1066*, Juv. Ct., Vol. I, p. 8). At the hearing the psychologist related to the Court C.J.'s response to the question "What would you like to tell the Judge?" C.J.'s response was "my daddy did do it, but he

won't do it no more." (*R-1070*, Juv. Ct. T. Vol. I, p. 16). After this hearing, the charges against Mr. Michaels were dropped and the children were returned to their parents.

Subsequently, notwithstanding the confidentiality of the report and immunity afforded by O.C.G.A. § 49-5-12, the Petitioners individually, and as next friend of their children, filed the above-styled action against Prodigy, attempting to hold the Respondent liable for the acts of DFCS.

During the course of the litigation against Prodigy the Petitioners attempted, without success, to obtain confidential files maintained by DFCS. Prodigy did not oppose these efforts and had no interest in the decision of the trial court to deny Petitioners' access to these files. Pursuant to the Petitioners' request, the court conducted an *in camera* inspection of the DFCS files to ascertain whether any of the information in the files was relevant to the underlying lawsuit. As a result of this *in camera* inspection the trial court determined that the material contained in those confidential

files was not relevant to any issue before it. Ultimately, the trial court granted Prodigy's Motion for Summary Judgment.

There is no question that Prodigy is entitled to the immunity provided to mandated reporters under O.C.G.A. § 19-7-5(f). Prodigy was required, under penalty of law, to report C.J.'s behavior. Furthermore, Prodigy's report was obviously made in good faith, as evidenced by the admission of the Petitioners' expert that the reported behavior was symptomatic of child abuse. Moreover, DFCS decision to remove the children from Petitioners' home was based upon statements made by C.J. during an interview conducted at Children's World, an unrelated daycare center. Finally, the Motion for Summary Judgment was based upon other theories and evidence in the record, not the least of which included the fact there was no evidence to support an alleged breach of contract claim.

The Petitioners attack O.C.G.A. § 49-5-41(c) upon the theory that it violates Article I, Section VIII; Article II,

Section II; Article II, Section III, and the Fourteenth Amendment due process guarantees. The Petitioners' access to the DFCS files might arguably have been relevant in regard to the deprivation hearing which resulted in the return of the children to Petitioners. However, since the children were returned to their parents at the conclusion of the deprivation hearing, the issue of whether Petitioners should or should not have been given access to the DFCS confidential files is now moot. The trial court's decision to grant summary judgment to Prodigy was not dependent upon the contents of the DFCS's files, nor did the DFCS files have any relevance to the Petitioners' lawsuit against Prodigy. Therefore, the Petitioners' claim that a Georgia statute controlling access to DFCS files violates their right to due process in their lawsuit against Prodigy is clearly without merit.

II.

SUMMARY OF THE ARGUMENT

This Court should refuse to grant this Petition for Writ of Certiorari because Petitioners are now attempting to raise constitutional issues which were not raised and passed upon in the State Court. Therefore, Petitioners' claim was not preserved and is now too stale for consideration by this Court. Furthermore, pretermitting Petitioners' failure to preserve their claim, this Court should refuse to grant this Petition for Writ of Certiorari because Petitioners' claim lacks merit. Contrary to the Petitioners' claim, O.C.G.A. § 49-5-41 does not deny the Petitioners' constitutional guarantee of due process. Indeed, this Court held in *Pennsylvania v. Ritchie*, 480 U.S. 39 (1987), that a substantially similar state statute comports with the principles of due process. Based upon the above, the Respondent respectfully requests this Court to deny this Petition for Writ of Certiorari.

III.

ARGUMENT AND CITATION OF AUTHORITY

A. Petitioners Did Not Preserve The Due Process Issues

Contrary to Petitioners' assertion on page 5 of their Petition for Writ of Certiorari, Petitioners did not raise any Fourteenth Amendment due process issues in the trial court. Indeed, neither the Motion to Compel nor the Motion for In Camera Inspection include any mention of constitutional issues. *See Appendices E-6 and E-22 of the Petition for Writ of Certiorari.* Furthermore, Plaintiff's Motion for Reconsideration in the Superior Court of Gwinnett County raised only a vague "separation of powers" issue under both the Georgia Constitution and the United States Constitution. *See Appendix E-1 of the Petition for Writ of Certiorari.* As stated by this Court:

> [A] vague appeal to constitutional principles does not preserve . . . due process claims. A party may not preserve a constitutional challenge by generally invoking the

> Constitution in the state court and awaiting review in this Court to specify the constitutional provision it is relying upon. *C.f., Taylor v. Illinois*, 484 U.S. 400, 407, n. 9, 108 S.Ct. 648, 652, n. 9, 98 LED 2d 798 (1988) ("a generic reference to the Fourteenth Amendment is not sufficient to preserve a constitutional claim based on an unidentified provision of the Bill of Rights . . .").

Bankers Life & Cas. Co. v. Crenshaw, 486 U.S. 71, 77 (1988). This Court should refuse to grant this Petition for Writ of Certiorari because Petitioners' claim that O.C.G.A. § 49-5-41(c) denies Petitioners their constitutional guarantee of due process was not raised and passed upon in the state court. *Id.*

B. Petitioners' Claim Has No Merit

Petitioners claim that O.C.G.A. § 49-5-41 denies the Petitioners due process because it fails to set forth guidelines, criteria, or rules for disclosure of DFCS' confidential records lacks merit. In fact, this statute contains a procedure by which a court may obtain DFCS' records, and the Petitioners

availed themselves of that procedure. O.C.G.A. § 49-5-41(a)(2). (*See Appendix A-1*).

The records which the Petitioner sought in the trial court are confidential and access thereto is prohibited except as provided by statute. O.C.G.A. § 49-5-40 *et. seq.* The proper procedure for obtaining access to such records is to petition the trial court to subpoena the records and conduct an *in camera* inspection as to whether the records are necessary for determination of an issue before the court and are otherwise admissible under the rules of evidence. *O.C.G.A. § 49-5-41(a)(2)*; *Ray v. Dept. of Human Resources*, 155 Ga. App. 81 (270 S.E.2d 303) (1980). These statutory guidelines were followed in the present case. The Petitioners filed a motion encouraging the trial court to conduct an *in camera* inspection, and the trial court subsequently granted this request and performed the *in camera* inspection. *See Motion for In Camera Inspection (Appendix E-22 of the Petition for Writ of Certiorari.* Following its review of the DFCS

records, the trial court ruled that the DFCS records could not be produced because the plaintiffs' "access to said records is not necessary for the resolution for the issues in the above-styled action and the records are not otherwise admissible under the rules of evidence . . ." *Order Denying Production of Documents by Gwinnett County Department of Family and Children Services (Appendix E-24 of the Petition for Writ of Certiorari).* Thus, contrary to Petitioners' assertions, O.C.G.A. § 49-5-41 not only provides "guidelines, procedures, [and] criteria" by which the DFCS confidential records might have been obtained, the Petitioners also availed themselves of these procedures in the trial court.

Moreover, the procedures established by O.C.G.A. § 49-5-41 comport with the requirements of due process. *See Pennsylvania v. Ritchie*, 480 U.S. 39 (1987). In *Ritchie*, this Court addressed the due process implications of a Pennsylvania statute which is substantially the same as

O.C.G.A. § 49-5-41[2]. Similar to the present case, the defendant in *Ritchie* had been charged with various sexual offenses against his minor daughter. The matter was referred to the Children and Youth Services (CYS), a protective service agency established by Pennsylvania to investigate cases of suspected child abuse. During pretrial discovery, the defendant served CYS with a subpoena seeking access to CYS' confidential records. CYS refused to comply with the subpoena, claiming that the records were privileged under a Pennsylvania statute which mandates that all CYS records must be kept confidential, subject to specified exceptions. One of those specified exceptions allows CYS to disclose its confidential reports to a court of competent jurisdiction pursuant to a court order. *Id.* at 43-44. This Court held that the defendant's due process guarantees are fully protected by a statutory procedure requiring that confidential child abuse

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[2]All 50 states and the District of Columbia have statutes that protect the confidentiality of their official records concerning child abuse. *Ritchie*, 480 U.S. at 60, n. 17.

files be submitted only to the trial court for *in camera* review. *Id.* at 60. In the present case, O.C.G.A. § 49-5-41(a)(2) provides for the *in camera* procedure approved by this Court, and the Petitioners availed themselves of this procedure. Thus, neither the Petitioners nor their attorneys in the present case have a constitutional right to conduct their own search of DFCS' files to determine the relevance of the contents of those files, and Petitioners have not been denied due process. *Id.* at 59.

Ritchie is not the only example of judicial approval of *in camera* inspection of privileged and confidential documents. It is well established that the *in camera* inspection procedure comports with the due process guarantees of the United States Constitution. *See U.S. v. Zolin*, 491 U.S. 566, 569 (1989) ("...this Court has approved the practice of requiring parties who seek to avoid the disclosure of documents to make the documents available for *in-camera* inspection..."); *In Re Grand Jury Matter of Catania*, 682 F.2d 61 (3rd Cir. 1982)

(given the secrecy attached to grand jury transcripts and FBI investigation materials, the district court's decision to exclude appellant and counsel from *in camera* examination of the materials comported with due process and was not in error); *United States v. Gallagher*, 576 F.2d 1028, 1040 (3rd Cir. 1978) (*in camera* questioning of witness in the absence of all attorneys was consistent with Jenck's Act and not in error); *Neustein v. Orbach*, 732 F. Supp. 333 (E.D.N.Y. 1990) (*in camera* interviews of children performed by family court did not deprive parents of due process). Furthermore, as explained by the United States Court of Appeals for the Second Circuit:

> While "[*i*]*n-camera* proceedings are extraordinary events in the constitutional framework" because they generally deprive one party to a proceeding a full opportunity to be heard on an issue, *In re Taylor*, 567 F.2d 1183, 1187 (2d Cir. 1977), they are by no means forbidden or without real usefulness in particularized circumstances. For example, they have been used to test claims of state secrets, *Halkin v. Helms*, 598 F.2d 1 (D.C.Cir. 1978); to excise material protected by privilege

> from that which is not, *United States v. Nixon*, 418 U.S. 683, 94 S.Ct. 3090, 41 L.Ed.2d 1039 (1974); to examine statements claimed to be irrelevant for purposes of the Jencks Act, 18 U.S.C. § 3500(b), *Palermo v. United States*, 360 U.S. 343, 354, 79 S.Ct. 1217, 1225, 3 L.Ed.2d 1287 (1959); *United States v. Pacelli*, 491 F.2d 1108 (2d Cir.), *cert. denied*, 419 U.S. 826, 95 S.Ct. 43, 42 L.Ed.2d 49 (1974); and to determine which of several instances of electronic surveillance might be challenged by a particular defendant, *Taglianetti v. United States*, 394 U.S. 316, 89 S.Ct. 1099, 22 L.Ed.2d 302 (1969).

In re John Doe Corp., 675 F.2d 482 (2d Cir. 1982). Preserving the confidential and privileged nature of the child abuse reports in the present case serves no less useful a purpose than the examples cited above. As explained by this Court in *Ritchie*:

> To allow full disclosure . . . in this type of case would sacrifice unnecessarily the Commonwealths's compelling interest in protecting its child abuse information. If the CYS records were made available to defendants, even through counsel, it could have a seriously adverse effect on Pennsylvania's efforts to uncover and treat abuse. Child abuse is one of the most difficult crimes to detect and prosecute, in large part because there often are

> no witnesses except the victim. A child's feelings of vulnerability and guilt and his or her unwillingness to come forward are particularly acute when the abuser is a parent. It therefore is essential that the child have a state-designated person to whom he may turn, and to do so with the assurance of confidentiality. Relatives and neighbors who suspect abuse also will be more willing to come forward if they know that their identities will be protected. Recognizing this, the Commonwealth--like all other states--has made a commendable effort to assure victims and witnesses that they may speak to the CYS counselors without fear of general disclosure. The commonwealth purpose would be frustrated if this confidential material had to be disclosed upon demand to a defendant charged with criminal child abuse, simply because a trial court may not recognize exculpatory evidence. Neither precedent nor common sense requires such a result.

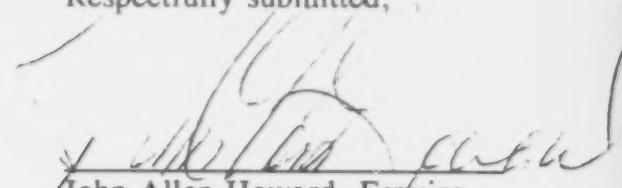
Ritchie, 480 U.S. at 60-61. Therefore, O.C.G.A. § 49-5-41 does not violate the Petitioners' constitutional guarantee of due process, and their claim to the contrary clearly lack merit.

IV.

CONCLUSION

WHEREFORE, Respondent respectfully requests this Court to deny the Petitioners' Petition for Writ of Certiorari.

Respectfully submitted,



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